Carbondale
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January 25, 1993

Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: MM Docket No. 92-266

Dear Sir/Madam:

Please find enclosed an original plus four copies of my comments in regards to the above matter. Thank you for your consideration.

Sincerely,

Michael L. Wepsiec
City Attorney

enclosures

cc: Jeff Doherty
City Manager

On January 4, 1993, the Federal Communications Commission (FCC) published a Notice of Proposed Rulemaking (NPRM) soliciting comments on the rate regulation provisions of the Cable Television Consumer Protection and Competition Act of 1992. (MM Docket No. 92-266, FCC 92-544). The NPRM raises scores of issues, all of which deserve careful consideration. I will not attempt to address each question posed in the NPRM; however, I would be remiss if I did not offer my thoughts on the more salient concerns of the FCC.

Before I speak on specific matters, I feel obliged to tell you a few things about myself and the community I represent. I am the City Attorney for Carbondale, Illinois. Pursuant to the franchise agreement between my city and our sole cable operator and city policy, I am to monitor cable services in Carbondale. This includes oversight functions vis-a-vis cable operations and receiving complaints about cable services. Carbondale is a city having 27,033 residents (1990 census); it is the home of Southern Illinois University. It is located approximately 100 miles south-southeast of St. Louis, Missouri. We are an ethnically diverse community and pride ourselves on being the cultural and educational center of Southern Illinois.

The city receives broadcast signals from several television stations, WSIL in Crainville, Illinois; WPSD in Paducah, Kentucky; KFVS and KBSI in Cape Girardeau, Missouri; WTCT in Marion, Illinois; WSIU in Carbondale, Illinois; and, when conditions are right, WCEE in Mt. Vernon, Illinois. Citizens having external antennas are probably able to access some St. Louis stations. The

cable operator in Carbondale is TCI of Illinois, a subsidiary of Tele Communications, Inc. TCI charges subscribers, as of this date, $18.95 per month for Basic Cable Service and an additional $2.15 per month for Expanded Basic Service. The vast majority of Carbondale subscribers receive Expanded Basic Service. According to the local TCI representative, only 20% of local subscribers subscribe to Basic Cable Services. Recently, TCI has advised the City that it will soon be re-tiering services. A new Basic Cable Service package, consisting of a number of on-air broadcast stations, will be offered at $10.95 per month. Systems that utilize satellites for broadcasting, i.e., CNN, TBS, etc., will become part of the new Expanded Package available to subscribers at $21.10 per month. To the extent this re-tiering allows those subscribers receiving cable services for better reception of broadcast stations, it is a move that will reduce monthly bills. For subscribers currently receiving Expanded Basic Service, there will be no change. My comments below are reflections of the status quo described here.

The FCC asks whether the purpose of the Cable Act of 1992 was to produce rates lower than those in effect upon enactment of the law or to provide a regulatory check on prospective increases. I believe that the former more accurately reflects Congress' intent. During the hearings before Senate Committee on Commerce, Science and Transportation, the Committee received a great deal of information of the effect of deregulation on cable subscribers. Rate increases of up to 221.9% were disclosed. These increases

greatly outpaced the rate of inflation during the relevant time period. Anger with the various cable operators and a desire to turn back the clock were apparent in the Committee's Report #102-92. Therefore, I believe that the FCC has authority to seek rate reductions in appropriate cases.

The statutory language, as I read it, appears to focus on the basic service tier. Section 3 of the Act provides a lengthy revision of Section 623(b) of the Communications Act of 1934 while, in comparison, it only briefly discusses rates for cable programming services. One might argue that Congress viewed basic service as a necessity for cable subscribers while expanded services tiers, having programming provided by ESPN and MTV among others, was seen as a luxury. Considering basic service as providing essential news, entertainment and information for the citizenry, it is entirely consistent to believe that Congress wanted to make available such essential items to a broad audience at rates affordable to the overwhelming majority of that audience. On the other hand, it is not unreasonable to conclude that Congress viewed cable programming such as MTV, ESPN, TNN, etc. as not being a necessary component to the informational welfare of the country. Such programming appeals to a more limited group. And, satisfaction of this limited audience's desires for such entertainment merits less governmental oversight as to cost. Thus, I think the FCC, if it is to adhere to the intent of the Act, should direct its primary attention to the basic service tiers.

The issue of retransmission consent is a touchy subject. One wonders whether local stations will hold cable operators hostage by setting outrageous fees in exchange for retransmission consent in order for the cable operators to satisfy their obligation under Section 4 of the Act. If such a scenario develops, as it probably will, the cable operator will be forced to choose between raising subscriber rates or incurring operational losses. The FCC must address this issue forcefully and attempt to limit the sums a local commercial station may "extort" from the cable operator. Otherwise, the consumer (whom Congress intended to benefit under the Act) will be the ultimate loser either through increased rates or through loss of cable services when the operator ceases operations.

The FCC seeks comments on a jurisdictional issue. The FCC preliminary interprets the Act as barring it from exercising rate regulatory powers unless a local franchising authority unsuccessfully seeks to assert such powers. I ask that the FCC reconsider this position. Many franchising authorities are small municipalities. These authorities lack the expertise, the financial resources, and/or the personnel to regulate rates effectively. Cable subscribers in these cities risk having unregulated rates should their political leaders decline to enter the regulatory forum. The effect may be that subscribers in smaller and/or poorer venues will pay more for the identical basic service than their counterparts in larger and far more affluent

perspective of the cable operator, which has multiple systems over a multistate region, it risks encountering Byzantine rate regulations, not any of which is the same. In order to sort out and comply with these myriad rules, the cable operator will incur additional administrative and legal burdens that will increase operating costs resulting in lower profits, higher rates, or both. The upshot is that the consumer loses again.

In lieu of abdicating jurisdiction over the regulation of basic service rates, I strongly recommend that the FCC lead the way in establishing reasonable rates as provided in the Amended Section 623(b). By so acting, the FCC will ensure some modicum of uniformity throughout the nation and lessen the administrative and legal burdens of cable operators. More importantly, citizens in small or poor communities would receive protection from unconscionable rates that is more or less equal to that enjoyed by those who reside in large or more affluent areas. A concomitant benefit of a standardized federal regulatory scheme is that it would eliminate any question of whether a local franchising authority has the expressed or implied power to regulate rates. Moreover, both the FCC and cable operators would be relieved of having to respond to franchising authorities which act inconsistent with the requirements of Section 623 (a)(3) or 623(b).

As to the issue of establishing rate regulation for the basic service tier, I strongly urge the FCC to use the extreme caution if it plans to employ a "benchmark rate." My fear is that, unless adequate consideration is given to the characteristics described in

the NPRM, the benchmark rate will become a price cap. For instance, if $10 per month is set as the benchmark of a reasonable rate for basic service and if an operator is charging subscribers $7 per month for basic service, those subscribers will soon be paying $10 per month for basic service. There needs to be some incentive for the operator, which has a rate below the benchmark, to maintain that rate. Perhaps greater latitude may be allowed the operator as to the rates it charges for non-basic cable programming.

In light of the Congressional mandate to simplify the methods for determining the reasonableness of rates, it appears inevitable that some sort of benchmark will be used. I would favor a system which considered, inter alia, the following: the economic characteristics of the franchise area served, the number of channels offered, the number of homes served, the size of the franchise area, the cost of the improvements made to the system, and a reasonable profit. The amount of profit allowed should be tied to some identifiable figure such as the prime rate or Treasury bill rate and should consider factors such as the economic status of subscribers in the franchise area. The use of a matrix as suggested in NPRM is entirely reasonable. It would allow a franchise authority or the FCC to examine the above factors more intelligibly in order to establish the benchmark of reasonableness.

With respect to the regulation of rates of cable programming service, all of the factors mentioned above apply here. However, if the FCC or a franchise authority intends to be more restrictive

in establishing a benchmark for basic cable service, equity dictates allowing the operator greater flexibility in setting rates for cable programming service. As I noted earlier, the programming at this tier is considered a "luxury" for most individuals. Thus, it is reasonable to expect those wanting to view such programming to pay a slightly higher fee. Finally, as to such "premium" stations such as HBO, Showtime, etc., the marketplace should dictate the price without regulatory interference from the FCC or a franchise authority.

The FCC seeks comments on the complaint procedure to be employed by subscribers and/or franchising authorities alleging unreasonable rates. Assuming that most subscribers are unsophisticated in the vagaries of cable television law and would not be represented by legal counsel, it is important to keep the complaint process simple. Either one of the alternatives described in the NPRM would allow a common citizen to voice his or her concerns about the rates being charged. A third alternative would be a "substantial suggestion" approach. If the subscriber presents <u>any</u> evidence suggesting that a rate may be unreasonable, the burden of proof would shift to the cable operator to demonstrate by a preponderance of the evidence that the rates are reasonable. The cable operators, under this approach, should not be unduly burdened in that they have the documents and other information to justify their rates. Moreover, most if not all operators have the financial wherewithal to retain legal counsel to assist them in their case. Lastly, by placing the ultimate burden of proof on the

cable operator, the operator would be forced to take a hard look at their rates and any potential increases in order to avoid complaints about their rates.

The NPRM contains several other sections dealing with other aspects of rate regulations, upon which the FCC seeks comments. I do not offer any comments on these matters for three reasons. One, as to some of the matters, I simply do not possess the expertise to offer an intelligent comment. Two, as to others, they simply do not affect my client at this time; and, they may never affect my client. Last, there are some items in the NPRM, e.g. negative options, on which I agree with the preliminary position proposed by the FCC. Moreover, I am sure that other individuals in this nation will offer their comments as to the matters upon which I have been silent.

To conclude my comments, I ask that the FCC make every effort to achieve ultimate fairness to the consumer in promulgating rate regulations. In close cases, the FCC should favor the subscriber. There are two reasons for this pro-consumer tack. First, the Cable Act of 1992 evidences a Congressional philosophy of consumer protection; indeed, the full title of the Act expresses this intent. The second reason finds its genesis in the current structure of the cable industry. Until alternative methods of delivering telecommunications to the general public are fully developed and implemented, the cable television industry will remain a monopoly. As such, the opportunities for overcharging subscribers and providing substandard service are ever-present.

testified before Congress presented numerous examples of these abuses of monopolistic power occurring during the period of deregulation. The Cable Act of 1992 offers an opportunity to the FCC to restructure the balance of power which shifted to the cable companies in the late 1980's. In focusing on the consumer in establishing rate regulations, the FCC can rectify the wrongs wreaked upon cable subscribers over the past half-decade.